

EXHIBIT D

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

BALLARD NURSING CENTER, INC.,)	
)	
Plaintiff,)	
)	
v.)	10 CH 17229
)	
KOHL'S PHARMACY & HOMECARE,)	
INC.,)	
)	
Defendant.)	

MEMORANDUM AND ORDER

Plaintiff Ballard Nursing Center, Inc. has filed an Amended Motion for Class Certification.

I. Background

On April 20, 2010, Plaintiff Ballard Nursing Center, Inc. filed a class action Complaint against Defendant Kohl's Pharmacy & Homecare, Inc. The Complaint alleges violations of the Telephone Consumer Protection Act of 1991 ("TCPA"), 47 U.S.C. §227, the Illinois Consumer Fraud and Deceptive Business Practices Act ("ICFA"), 815 ILCS 505/1 *et seq.*, and a claim for common law conversion. Plaintiff's claims are based on the alleged sending of an unsolicited fax advertisement to Plaintiff.

II. Amended Motion for Class Certification

Plaintiff filed an Amended Motion for Class Certification. The proposed class definition is as follows:

(a) all parties (b) who, on or about March 3, 2010, (c) were sent advertising faxes by defendant (d) and with respect to whom defendant cannot provide evidence of consent or a prior business relationship.

A. Section 2-801

The certification of class actions is governed by section 2-801 of the Illinois Code of Civil Procedure. 735 ILCS 5/2-801. To certify a class action, the Court must find:

(1) The class is so numerous that joinder of all members is impracticable.

- (2) There are questions of fact or law common to the class, which common questions predominate over any questions affecting only individual members.
- (3) The representative parties will fairly and adequately protect the interest of the class.
- (4) The class action is an appropriate method for the fair and efficient adjudication of the controversy.

735 ILCS 5/2-801. Because of the relationship between section 2-801 and Federal Rule of Civil Procedure 23 ("Rule 23"), federal decisions interpreting Rule 23 are considered persuasive authority in interpreting and applying section 2-801. Avery v. State Farm Mut. Auto. Ins. Co., 216 Ill. 2d 100, 125 (2005). A party seeking class certification has the burden of establishing all the prerequisites of section 2-801 before a class can be certified. Aguilar v. Safeway Ins. Co., 221 Ill. App. 3d 1095, 1102 (1st Dist. 1991).

B. Numerosity

If a class has more than forty individuals, numerosity is satisfied. Wood River Area Development Corp. v. Germania Federal Savings & Loan Ass'n, 198 Ill. App. 3d 445, 450 (5th Dist. 1990)(citation omitted). Discovery in this case has established that Defendant purchased a list of fax numbers from Red Door Marketing. (Motion, Ex. B, Answer to Interrogatory No. 4). Defendant then utilized the services of WestFax to transmit the fax advertisement at issue. (Id. at Answer to Interrogatory Nos. 3, 8; Motion, Exs. C and D). WestFax successfully sent the advertisement to 4,142 separate fax numbers. (Motion, Exs. D through G). Numerosity is satisfied.

C. Predominance of Common Issues of Fact and Law

"The purpose of the predominance requirement is to ensure that the proposed class is sufficiently cohesive to warrant adjudication by representation, and it is a far more demanding requirement than the commonality requirement of Rule 23(a)(2)." Smith v. Illinois Central R.R., 223 Ill. 2d 441, 448 (2006). "The test for predominance is not whether the common issues outnumber the individual ones, but whether common or individual issues will be the object of most of the efforts of the litigants and the court." Id. at 448-49. In determining whether common issues will predominate over individual issues, the court must identify the substantive issues of the case and "look beyond the pleadings to understand the claims, defenses, relevant facts and, applicable substantive law." Id. at 449. "Satisfaction of Section 2-801's predominance requirement necessitates a showing that 'successful adjudication of the purported class representatives' individual claims will establish a right of recovery or resolve a central issue on behalf of the class members.'" Id., quoting Avery, 216 Ill. 2d at 128. "The fact that the class members' recovery may be in varying amounts which must be determined separately does not necessarily mean that there is no predominate common question." McCarthy v. LaSalle Nat'l Bank & Tr. Co., 230 Ill. App. 3d 628, 634 (1st Dist. 1992).

1. Consent/Established Business Relationship

Defendant asserts that consent or the existence of an established business relationship are individual questions precluding class certification. Numerous courts, including this court, have rejected this assertion.

Defendant has the burden of showing consent or an established business relationship. *E.g.*, 47 C.F.R. 64.1200(a)(3); 21 FCC Rcd 3787, 2006 FCC LEXIS 1713, ¶12 (an entity which sends a fax advertisement on the basis of an established business relationship has the burden of demonstrating the existence of such relationship). Courts have also held that the plaintiff has the burden of showing that a faxed advertisement was unsolicited. *E.g.*, Saf-T-Gard Int'l. Inc. v. Wagener Equities, Inc., 251 F.R.D. 312, 314 (N.D. Ill. 2008); Hinman v. M & M Rental Ctr., 545 F. Supp. 2d 802, 805 (N.D. Ill. 2008). However, even if the class members have the burden of proving that the fax sent by Defendant was unsolicited, this does not prevent class certification.

In Hinman v. M & M Rental Ctr., 545 F. Supp. 2d 802, 806 (N.D. Ill. 2008), the complaint alleged that the defendants had engaged a third party to send more than 3,000 faxes to targeted businesses. *Id.* The Hinman court found that this standardized conduct toward all the potential class members allowed the issue of consent to "rightly be understood as a common question" and the fact that some individuals on the list might have consented to receiving the transmissions at issue was an insufficient basis for denying class certification. *Id.* at 807. The Hinman court further rejected the defendants' argument that defining the class to include only individuals who did not consent did not circumvent the commonality requirement and reach into the merits of the case. *Id.*

In Kavu, Inc. v. Omnipak Corp., 246 F.R.D. 642, 647 (W.D. Wash. 2007), the court rejected the defendant's contention that a key issue not common to the class members was whether they gave permission to receive the faxes at issue. The Kavu court found that the class was not defined in such a way as to require inquiry into the merits. *Id.* The Kavu court further found that given the fact that the defendant obtained all the recipients' fax numbers from the same database whether the recipients' inclusion in the database constituted express permission to receive faxed advertisements was a common issue amenable to class certification and there would be no need for individual inquiry. *Id.*

In Saf-T-Gard International, Inc. v. Wagener Equities, Inc., 251 F.R.D. 312, 315 (N.D. Ill. 2008), it was undisputed that some number of faxes had been sent on the defendants' behalf to potentially tens of thousands of individuals unknown to the defendants. The Saf-T-Gard court found that this type of organized program of fax advertising lends itself to common adjudication of the fax issue. *Id.*

Based on the sound reasoning of Hinman, Kavu and Saf-T-Gard which involved mass-faxing by a third-party on behalf of the defendants, as in this case, consent and the existence of an established business relationship are issues which can be commonly adjudicated. It will not be necessary for each individual class member to show lack of consent. Where a defendant has acted wrongly in the same basic way to all the members of a class, common class questions

predominate. Martin v. Heinold Commodities, Inc., 139 Ill. App. 3d 1049, 1060 (1st Dist. 1985). Defendant's speculation that it may have had an established business relationship with some of the putative class members or that some of the putative class members may have consented to receive the faxes will not prevent class certification. Miner v. Gillette Co., 87 Ill. 2d 7, 19 (1981)(hypothetical individual issues will not prevent class certification).

Finally, Defendant argues that the conversion claim should not be certified because some recipients may have received the fax by computer, and not lost any toner or paper. Defendant, however, offers nothing but speculation. Hypothetical issues will not prevent class certification.

D. Adequacy of Representation

"The test applied to determine adequacy of representation is whether the interests of those who are parties are the same as those who are not joined and whether the litigating parties will fairly represent those interests." Miner, 87 Ill. 2d at 14. "The attorney for the representative party 'must be qualified, experienced and generally able to conduct the proposed litigation.'" Id. "Additionally, plaintiff's interest must not appear collusive." Id.

Defendant argues that Plaintiff is not an adequate class representative because it has no independent knowledge of the fax sent by Defendant. This claim is belied by the deposition testimony of Eli Pick, the executive director of Ballard Nursing Center on the date the fax was received. (Pick's Dep. at 8-9; 15-16).

Defendant also asserts that Plaintiff will not represent the interests of the class because it is a professional plaintiff routinely bringing TCPA claims. Defendant fails to explain how the fact that Plaintiff has filed other TCPA class actions prevents it from adequately representing the interests of the putative class members. In fact, it is clear that Defendant's real issue is Plaintiff's protection of the absent putative class members interests by refusing Defendant's tender offer after Plaintiff has filed its motion for class certification. Plaintiff has demonstrated that it will adequately represent the class members.

E. Appropriate Method for Resolution of Claims

In deciding whether a class action is an appropriate method for the fair and efficient adjudication of the controversy, "a court considers whether a class action: (1) can best secure the economies of time, effort and expense, and promote uniformity; or (2) accomplish the other ends of equity and justice that class actions seek to obtain." Gordon v. Boden, 224 Ill. App. 3d 195, 203 (1st Dist. 1991). Given the large number of putative class members, the relatively small amount of damages involved as to each class member, and the common issues, class certification is an appropriate method of adjudication.

III. Conclusion

Plaintiff's Amended Motion for Class Certification is granted. The status scheduled for April 22, 2013 at 9:30 a.m. is stricken.

Enter: _____

Judge Neil H. Cohen

